judgment action had been obtained to allow construction of a 70-foot condominium. Bochese continued to receive monthly installment payments until at least March 2003 as consideration to keep the property available. At no time did any representative from PLPI file a request to include the Bochese property back into the remaining PUD "ocean front" project. At no time did Bochese file a request to include and incorporate his property back into the remaining PUD "ocean front" project. At no time prior to November 2002, did PLPI receive final development approval to construct a 70-foot condominium on the subject property.

The Fifth Amendment sought to correct the changes to the PUD specifically related to the Beach Club and the removal of all property east of the Atlantic Avenue and all the areas in dispute. The Town Council also instructed the Town Attorney to file a declaratory action in the Circuit Court in order to determine the legal implications of the approval, and subsequent repeal of Ordinance 84-11 by the Town as it relates to the existence of the Fourth Amendment to the Development Agreement. The original declaratory action named PLPI, and property owners, DiFranco, Jacobs, Bochese and the Towers VII Condominiums as respondents.[2] It was the Town's intention to seek the court's determination as to whether PLPI had the right to construct buildings at a height in excess of 35 feet on all or part of its oceanfront property, rather than the 35-foot height limitation provided by the Town Charter. It

[2] Bochese, as a party, was voluntarily dismissed from the Town's declaratory action after Bochese's counsel, Paul Meredith, Esquire, filed a motion to dismiss the declaratory action. However, PLPI still maintained that it had an interest in the Bochese property and the subject property was included in the disposition of the declaratory action.

was the Town's position that DiFranco, Jacobs and the Tower VII Condominiums had a valid argument that the ordinance adopted and/or the agreement executed violated the Town Charter, which constituted an *ultra vires* act, making the legal effect void as to the rights of the Town and the rights of PLPI.

As a result of the declaratory action, PLPI filed a counter-petition claiming damages resulting from an alleged diminution of the market value of the property due to their inability to develop the property as they anticipated. After the conclusion of a hearing on the merits of the declaratory actions filed by the Town and PLPI, the Circuit Court of Volusia County issued an order, including stipulations of fact, concluding that PLPI could not construct a 70-foot condominium on the "ocean front" property as proposed. The court further concluded that *"The Petitioner, TOWN OF PONCE INLET, FLORIDA, through its council, properly adopted a resolution and Fifth Amendment on February 27, 2002, thereby re-establishing the thirty-five foot height limitation to the Beach Club property."*[3] The Circuit Court issued a substituted order dated on April 11, 2003 which stated the following: *"The Town Council properly repealed the Fourth Amendment to the Development Agreement and properly adopted the Fifth Amendment. This action left in effect the Third Amendment to the Development Agreement regarding the Beach Club phase, which limited construction on that phase to 35 feet. The developer accepted that Amendment. Thus, no claim of estoppel is warranted."*[4] Further, the court stated

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[3] *See* Appendix A.

[4] *See* Appendix B.

"At the time of the repeal of Ordinance 84-11 and the approval of the Fifth Amendment, no construction had yet begun on the properties zoned T-1, added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by the Respondent Ponce Lighthouse Properties, east of Atlantic Avenue only, is subject to the 35-foot height restriction." This ruling included the Bochese property. Thereafter, no appeal was taken by any party and the ruling of the Circuit Court of Volusia County became final and binding upon all parties and interested persons.

The Town of Ponce Inlet, through its employees, officials, and retained counsel have denied and continue to deny that any action in this matter was based on any retaliatory motive or intent against the Petitioner and no evidence was demonstrated to the contrary. Therefore, the Town specifically rejects and denies any allegations contained in the Petitioner's Statement of Facts which suggest such falsehoods.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully prays that this Honorable Court deny the Petitioner's request for a writ of certiorari and affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The decision below does not conflict with a decision of this Court, or any other federal circuit court, since the determination of standing to assess federal court jurisdiction was well supported by binding precedent established in this Court

and Eleventh Circuit. The petition, which relies upon the holding and dicta of this Court's decisions in *Village of Euclid v. Amber Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and *Kelo v. New London, Connecticut*, 545 U.S. ___, 125 S.Ct. 2655, ___ L.Ed.2d ___ (2005) does not accurately demonstrate that these cases are conflicting precedent based on the specific factual circumstances established before the district court and the circuit court below.

ONE

Review of Petition for Writ of Certiorari Should Be Denied as the Underlying Decision of the Eleventh Circuit Regarding Petitioner's Lack of Standing Does Not Conflict with the Decisions of the United States Supreme Court or Other Federal Circuit Courts

The petition for writ of certiorari should be denied since the underlying decision of the Eleventh Circuit regarding Bochese's lack of standing does not conflict with the decisions of the United States Supreme Court or other circuit courts.

Question One presented in the petition incorrectly characterizes the Town's action as a "comprehensive zoning change" to Bochese's property. As stated above, PLPI presented an application to incorporate the Bochese property under PLPI existing PUD classification so long as PLPI met the conditions under the Town's Land Development Code. Once PLPI failed to meet the unified ownership condition under the Town's LDC, the subject properties, including Bochese's property were returned to its former zoning classification. In this case, the Eleventh

Circuit held that Bochese had no standing to challenge issues involved in the development agreement between the developer, PLPI and the Town. Thus, the court did not have subject matter jurisdiction.

Accordingly, "[w]hen a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212, 92 S.Ct. 418, 425, 30 L.Ed.2d 383 (1971) *citing Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986). Indeed, such an action unconstitutionally invades the powers reserved to the states to determine controversies in their own courts, *see*: *Victory Carriers*, 404 U.S. at 212, 92 S.Ct. at 425 (*quoting Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934)), as well as "offends fundamental principles of separation of powers," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998). Once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue. This principle of law extends back as far as this Court's opinion in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868), which held that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514; *see also Wernick v. Mathews*, 524 F.2d 543, 545 (5th Cir. 1975) ("[W]e are not free to disregard the jurisdictional issue, for without jurisdiction we are powerless to consider the merits.").

> The jurisdiction of a court over the subject matter of a claim involves the court's competency to consider a given type of case, and cannot be

> waived or otherwise conferred upon the court by the parties. Otherwise, a party could 'work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them.'

See: *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000-01 (11th Cir. 1982) (*quoting American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18, 71 S.Ct. 534, 542, 95 L.Ed. 702 (1951)).

A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. Indeed, it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking. *See*: *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (*per curiam*); *Wernick*, 524 F.2d at 545; *see also Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) (*per curiam*) (holding that courts must constantly examine the basis of their jurisdiction before proceeding to the merits). Moreover, "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934) (*citing Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884)).

This Court in *Vermont Agency of Natural Res. v. United States ex rel. Stephens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) stated, "Standing is a doctrine that 'stems directly from Article III's "case or controversy" requirement and thus it implicates our subject

matter jurisdiction.'" Standing is "perhaps the most important" jurisdictional doctrine. *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). This obligation is imperative whether the issue is raised by the parties or at any stage of the litigation. *See*: *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 759 (11th Cir. 1991).

In this case, the petition for writ of certiorari must be denied since the Eleventh Circuit's correctly determined that Bochese lacked standing to challenge the terms and conditions of a contractual relationship between the Town of Ponce Inlet and the developer, PLPI. The Eleventh Circuit opinion properly recognized and concluded that the "plaintiff has burden to 'clearly and specifically set forth facts sufficient to satisfy Article III standing requirements.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). "If the plaintiff fails to meet its burden, this court lacks power to create jurisdiction by embellishing a deficient allegation of injury." *Id.*

Although the Eleventh Circuit candidly, yet correctly characterized Bochese's allegations as a "moving target" throughout the litigation, the circuit court's decision correctly understood that any and all claims against the Town asserted in his First Amended Complaint purportedly arose out of PLPI's development application and the Fourth Amendment to the Development Agreement with the Town. More disturbing, Bochese mis-characterizes his re-zoning argument as articulated in the petition as if these new claims were actually subject matter raised before the district court and circuit court below. The Eleventh Circuit opinion clearly stated that Bochese's attempts to re-adjust his arguments and claims were denied by the district court and were not raised on appeal.

The circuit court's opinion clearly reprimanded Bochese's counsel for his attempt to alter the contents of the appellate record by inserting a copy of a proposed Second Amended Complaint that was not included in the original court record. Therefore, the circuit court properly reviewed only those allegations which were contained in Bochese's operative pleading, his First Amended Complaint served on July 3, 2003. Based on the allegations contained in that operative pleading, the circuit court correctly determined that Bochese did not have standing to challenge contractual issues between the Town and PLPI regarding the development of a 70-foot condominium.

Bochese attempts to conjure up a conflict with this Court's precedent where none exists by pointing to this Court's decisions, including its dicta, in *Euclid, supra*, *Kelo, supra*, or *Palazzolo, supra*. Other than the similarity that all of the cases cited are land use issues, nothing in these opinions governs, or even conflicts with the Eleventh Circuit's finding that Bochese did not have standing to challenge issues to which he was neither a contractual participant or a legally recognized third party beneficiary. Thus, the underlying opinion of the Eleventh Circuit is not conflicting with any decision of this Court or any other federal circuit opinions based on the specific factual circumstances presented before the district court and the Eleventh Circuit.

Therefore, Respondent respectfully requests this Honorable Court to summarily deny the petition for writ of certiorari as to Question One as presented.

TWO

Review of Petition for Writ of Certiorari Should Be Denied as the Underlying Decision of the Eleventh Circuit Does not Contradict the Application or Use of the "Well Pleaded Complaint" Rule of Other Decisions of the United States Supreme Court or Other Federal Circuit Courts

The petition for writ of certiorari should be denied since the underlying decision of the Eleventh Circuit does not contradict the application or use of the "well pleaded complaint" rule as established under federal court precedent. As grounds for affirming the district court's opinion on the issue of standing, the circuit court properly limited the determination of Bochese's standing to raise a constitutional claim based upon the allegations contained in its operative complaint filed and served on July 3, 2003. It is well settled that a court has the inherent power to control its trial docket and limit the number and manner in which pleadings are amended. *See*: *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962); *Royal Palace Hotel Associates, Inc. v. International Resort Classics, Inc.*, 178 F.R.D. 588 (M.D. Fla. 1997). In addition, it is well settled that the Eleventh Circuit as well as all other circuit courts use the abuse of discretion standard when reviewing a district court's decision to grant a motion for leave to amend the pleadings. *See*: *Diesel "Repower," Inc. v. Islander Investments, Ltd.*, 271 F.3d 1318 (11th Cir. 2001).

Even more obvious is that the Plaintiff's counsel, in the preparation of the required Case Management Report, agreed to the actual deadline (i.e., May 5, 2003), in which he could add parties or amend the pleadings. The circuit court clearly determined that Bochese was allowed, despite the Town's objection to amended his original

Complaint and file his First Amended Complaint on July 3, 2003 after the amendment deadline had expired. When Bochese attempted to amend his First Amended Complaint for the second time on November 3, 2003, despite the Town's objection, the district court denied Plaintiff's motion. As a basis for the denial the district court cited the May 5, 2003 deadline and considered the motion untimely.[5] Implicit in the circuit court's opinion is the fact that the court found that Bochese's November 3, 2003, motion for leave to amend was not granted and therefore, the issues or claims raised in the "proposed" Second Amended Complaint were not before the court to consider in its determination of subject matter jurisdiction.

It is also important for the Court to fully understand and appreciate the complete lack of merit of this argument since the petition failed to advise the Court that Bochese, by and through his counsel of record has subsequently filed a lawsuit in the Circuit Court of Volusia County, Florida in which he asserts a claim under Florida's Bert J. Harris Act, Section 70.001 *Fla. Stat.* for the exact issues that he claims he was denied in the case at bar.

Further, Bochese asserts that the court erred in failing to consider this omitted argument because the

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[6] It should be noted that the Town failed to receive an opinion from the district court on its Motion to Dismiss Plaintiff's First Amended Complaint prior to the November 4, 2004 deadline to file its Motion for Summary Judgment and the Town was forced to file its Motion for Summary Judgment without any indication as to which claims were even actionable. Thus, it was argued that if Plaintiff was granted leave to amend one day prior to the deadline to file its Motion for Summary Judgment and after discovery had been closed, the Town would have been prejudiced. This point was addressed in the Town's Response Brief to the Eleventh Circuit.

parties expressly consented to try this issue in the Joint Pre-Trial Statement. On the contrary, there is no evidence in the record, that the parties "expressly agreed" to try issues that were not included in the operative pleading filed in July 2003 or that the Town agreed to include new or different issues that were sought to be asserted in Bochese's Second Amended Complaint despite its objection to the motion for leave to amend.[6] Further, the Town had already filed its motion for summary judgment specifically addressing only those issues and claims raised in the First Amended Complaint.[7] Therefore, since the court properly excluded this issue of Ordinance 84-11 as sought in Plaintiff's Second Amended Complaint and therefore not addressed in the Town's motion for summary judgement as an issue before the court, it is disingenuous of Bochese to assert that such allegations were properly before the district or circuit court based on the expressed consent of the Town.

Further, the petition erroneously asserts that the Eleventh Circuit opinion below left unchecked will create confusion and inconsistency amongst the circuits in applying Rules 10(c) and 15(b) of the Federal Rules of Civil Procedure. Nothing in the Eleventh Circuit's opinion actually conflicts with the provisions of Fed. R. Civ. P. Rule

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[6] This argument is raised for the first time before this Court as well as any other court. The "express consent" argument was not raised by the Petitioner at any stage before the Eleventh Circuit, even when given the opportunity during oral argument to address the standing issue.

[7] App. 50-1 of the Petition contains the district court's grounds for granting the Town's Motion for Summary Judgment because Bochese failed to provide any record cites making it difficult to discern what evidence was being offered by the Plaintiff to defeat summary judgment.

15(d) since the review of the contents of the filed Joint Pretrial Statement did not create express consent that additional new claims would be tried that were not already contained in the operative pleading. The Joint Pretrial Statement filed with the court does not create subject matter jurisdiction by expressed consent of the parties nor should the document allow Bochese to circumvent an order of denial to amend the pleadings.[8] Nothing contained in the parties joint pre-trial statement demonstrates that the Town consented to new or different issues to be tried that were not alleged in the July 3, 2003 operative complaint and therefore the petition based on Question Two must be summarily denied.

THREE

Review of Petition for Writ of Certiorari Should Be Denied Because the Petitioner Improperly Attempts to Raise a Collateral Due Process Argument Arising out of the Eleventh Circuit's Decision to Find a Lack of Subject Matter Jurisdiction as a Ground for Affirming the District Court's Opinion

The petition for writ of certiorari should be denied because Bochese improperly attempts to raise a collateral due process argument arising out of the Eleventh Circuit's decision to find a lack of subject matter jurisdiction as a ground for affirming the district court's opinion. Bochese now attempts to assert a new constitutional claim or

[8] Inclusion of Paragraph 27 of the J.P.T.S. does not represent the Town's expressed consent to create and include this statement as a triable issue before the court since Plaintiff's statement was inserted in the J.P.T.S. despite objection by the Town.

alleged wrong that he was denied due process under the Fourteenth Amendment caused by the circuit court's *sua sponte* determination of a lack of standing to maintain subject matter jurisdiction under Article III. Bochese erroneously asserts that the issue of standing was not raised in the district court and therefore counsel was denied an opportunity to address this issue before the circuit court. Although the circuit court's decision recognized that the district court's ruling contained a non-jurisdictional basis for granting summary judgment since Bochese suffered no actual injury, the court record reflects that Bochese's counsel was given full opportunity to address the issue of standing during oral argument before the Eleventh Circuit on December 7, 2004. A review of the transcript of the oral argument will reveal that the standing determination was raised by Judge Marcus in the very first question directed toward Mr. Meredith and the undersigned during the respective portions of oral argument. Following oral argument, the record is undisputed that Bochese, by and through his counsel, did not seek to address the standing issue by either providing supplemental briefs or case law to the court, or even attempt to file a motion for re-hearing or re-hearing *en banc* to review this issue before or after the actual opinion was rendered by the court.[9] Further, since the issue of subject matter jurisdiction cannot be waived or consented to by the parties, subject matter jurisdiction and standing must always be at the forefront of plaintiff's counsel's mind at

[9] Bochese's motion to supplement the court record with new evidence, including affidavits was denied by the Eleventh Circuit prior to oral argument. Although, Bochese did file a Notice of Supplemental Case Law following oral argument, none of the cases addressed the standing issue discussed during oral argument.

all stages of the litigation. For Bochese to claim that he was "blind-sided" by a jurisdictional argument is factually incorrect and without merit. Therefore, the circuit court's standing determination in this case is not in contradiction to the holdings of other circuits and thus does not invoke the jurisdictional review of this Court.

Finally, Bochese claims he was prejudiced by the circuit court's actions since he was not provided an opportunity to fully litigate the issues of this case. As the record clearly indicates, both courts below provided Bochese a full and fair opportunity to litigate his claims, including but not limited to, (1) allowing Bochese to amend his pleadings once outside the scheduling order deadline, (2) allowing Bochese an additional 30 days to take discovery beyond the discovery cut-off deadline established by the scheduling order, (3) providing Bochese an unprecedented entire court day to articulate his opposition to the Town's motion for summary judgment, and (4) providing Bochese with appellate review, including the opportunity for re-hearing or re-hearing *en banc*, plus oral argument to redress his perceived errors in the district court rulings. Further, the exact legal issue which Bochese claims he was denied an opportunity to redress in this case is currently pending in a Florida state court case.[10]

Therefore, Respondent respectfully requests this Honorable Court to summarily deny the petition for writ of certiorari as to Question Three as presented.

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[10] *See* Appendix C. The Respondent makes no representations that the pending Bert J. Harris Act claim in the Circuit Court of Volusia County has any merit or is even viable pursuant to the doctrine of equitable estoppel.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

THE TOWN OF PONCE INLET, FLORIDA, a municipal corporation of the State of Florida,

Petitioner,

vs.

CASE No. 2002-30561 CICI (32)

PONCE LIGHTHOUSE PROPERTIES, INC., a Florida corporation, et al.,

Respondents,

ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

THIS CAUSE came on before the court on January 17, 2003, to consider the following matters: Petition for Declaratory Relief filed by the Petitioner, TOWN OF PONCE INLET, on March 7, 2002, joined in by Respondents, TOWERS VII CONDOMINIUM ASSOCIATION, INC., MICHAEL DiFRANCO, ELIZABETH DiFRANCO, DAVID JACOBS and ANN JACOBS, by Answer filed May 6, 2002; and Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., Counter-petition for Declaratory Relief and Injunctive Relief filed April 10, 2002. Counsel for the parties having been present and heard, and the court having read the supporting memoranda and authorities cited and being duly advised in the premises, finds as follows:

The parties have stipulated to the majority of the material facts in this case. The court also has considered the numerous exhibits admitted by the parties for the purpose of confirming and supplementing the admitted facts as necessary. These material facts are set out below.

FACTS AS TO THE HEIGHT RESTRICTION

1. The Petitioner, ~~TOWN OF~~ PONCE INLET, (hereinafter "TOWN") was formed in 1963 under a model charter which did not address planning or zoning issues. Rather, the charter, at Article X, deferred all planning decisions to the Town Council and all zoning decisions to the South Peninsula Zoning Board. The Zoning Board enacted Resolution 74-14 to serve as zoning regulations for the TOWN. The Zoning Board later enacted Resolution 74-22 to zone certain property owned by the Teachers Retirement System of Georgia as a Planned Unit Development ("P.U.D".)

2. Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., (hereinafter ~~"PONCE~~ LIGHTHOUSE") is the current record owner of a parcel of realty, approximately 178 acres in size, which was zoned as P.U.D. by Resolution 74-22. The sub-parcel at issue herein is described as the "Beach Club" consisting of approximately three hundred feet of oceanfront property within the TOWN.

3. On or about October 13, 1976, the TOWN council passed Resolution 76-18 amending Resolution 74-22 to limit the height of residential buildings to seven stories. It also adopted previous actions of the South Peninsula Zoning Board.

4. On or about September 14, 1977, the TOWN adopted Ordinance 77-10. This ordinance created zoning regulations within the town. It also set forth building height limitations for P.U.D.'s at seventy feet and no more than seven stories north of Inlet Harbor Road and no more than thirty-five feet south of Inlet Harbor Road.

5. On or about August 24, 1983, the TOWN Council passed Ordinance 83-012. This ordinance placed a proposed amendment to the Charter before the electors of the TOWN at a referendum to be held in November 1983. The proposed amendment is quoted as follows: "(a) Shall the Charter of the Town of Ponce Inlet, Florida, be amended to limit all buildings in the Town to a maximum height of thirty-five (35') feet?" The ordinance recited several reasons supporting the restriction, one of which was that "a proliferation of buildings exceeding thirty-five (35') in height will negatively impact the quality of life within the Town of Ponce Inlet." The proposed amendment was approved by a majority of the electors at the referendum held November 8, 1983. It became effective on November 29, 1983 upon filing with the Florida Secretary of State. The subject charter amendment was incorporated into the revised charter of the Town of Ponce Inlet effective January 16, 1984. Town Charter Article VII (Zoning), at Section 7.02 (Height limitation), reads as follows:

> Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet.

The charter amendment contained no exemptions, exclusions or other language limiting the height restriction.

6. On May 9, 1984, the TOWN Council adopted Ordinance 84-11. The ordinance created an exception to

the charter amendment of November 8, 1983 stating that the thirty-five foot height limitation would not apply to property zoned "T-1" as of November 8, 1983 nor to properties developed with buildings or buildings under construction with an existing or planned height greater than thirty-five feet but not more than seventy feet. The council stated in the ordinance that it was the "interpretation of the Town Council that the charter amendment adopted by the electors does not require that all property presently zoned to permit buildings of a height in excess of thirty-five (35') shall be restricted in the future to prohibit buildings of a height no greater than thirty-five (35') feet. . . ." It states:

> (c) Properties zoned Planned Unit Development (P.U.D.) may be developed under the terms and provisions of applicable P.U.D. agreements between the Town and property owner, or developer of property classified P.U.D. as of November 8, 1983.

7. On or about November 20, 1985, the TOWN approved Ordinance 85-27 which established new zoning regulations for the Town. It repealed Ordinance 77-10 and incorporated any orders or resolutions pertaining to P.U.D.'s and Ordinances 84-10 and 84-11. Section 700.09 entitled "T-1, Tourist Accommodations," under the subsection "Maximum Building Height," states "35 feet, except that the maximum building height shall be 70 feet in all districts that existed prior to the effective date of Ordinance 84-11 implementing the referendum of November 8, 1983 that restricted building height to 35 feet. The provisions of Ordinance 84-11 shall not be affected and shall remain in full force and effect."

8. On or about July 14, 1986, the TOWN council adopted Ordinance 86-12. It approved the Development Agreement with PONCE LIGHTHOUSE's predecessors in title. It was signed by the mayor, all members of the Town council and the developer. Paragraph one, states the following:

> However, it is understood by all the parties hereto that the Developer retains vested rights to the P.U.D. zoning and all of the prior terms and conditions of that zoning, except as amended by this Agreement, and that by entering into this Agreement, there is no waiver of any prior terms and conditions or vested rights in the zoning and terms and conditions attached thereto.

Paragraph six states the following:

> It is understood and agreed by the parties hereto that the amendments to the Town's Charter restricting the height of buildings constructed within the municipal limits to thirty-five feet (35') do not apply to the P.U.D. To the extent that there is a specific conflict between this Agreement and existing Town Resolutions and regulations, this Agreement shall control. The Developer agrees to be bound by all other applicable provisions of the Town's Zoning Ordinance not in conflict with this Development Agreement and other applicable Ordinances, including the Subdivision Ordinance and the Stormwater and Conservation Ordinance in force as of the date of the execution of this Agreement, or future amendments of said Ordinances where not inconsistent with this Agreement. This Agreement may be amended by mutual agreement of the parties, their heirs, successors, or assigns.

Paragraph twenty states the following:

> Unless otherwise specified in this Agreement, the ocean-front section of the P.U.D. . . . will be developed in accordance with the requirements set forth in the Zoning Ordinance of the Town of Ponce Inlet (Ordinance No. 85-27) in category "T-1", Tourist Accommodation, in force at the time of this Agreement. The maximum building widths will be two hundred fifty feet (250'). The minimum separation between buildings will be fifty-five feet (55'). However, building separation will be maximized whenever possible. The building height shall be the minimum required to allow construction of buildings having the first floor parking, plus seven (7) stories of apartments, with nine foot (9') ceilings, a truss roof and standing elevator equipment facilities. The actual building height will not exceed eighty-five feet (85') from the existing ground level.

The Development Agreement was modified and recorded in the public records of Volusia County in December 1993 (the First Amendment); March 1996 (the Second Amendment); and November 1996 (the Third Amendment). The Third Amendment states the following regarding the Beach Club property:

> The maximum building height for the beach club will be thirty-five (35) feet. . . .

9. The TOWN issued building permits to developers other than PONCE LIGHTHOUSE that allowed construction of seven-story condominium buildings on the following dates: June 15, 1988; December 29, 1988; August 2, 1990; March 19, 1992; December 31, 1992; February 25, 1994; December 4, 1995; June 17, 1997; January 14, 1998; December 17, 1998; August 26, 1999, and May 21, 2002.

The TOWN issued building permits to build a cellular telephone tower to a height in excess of thirty-five feet on August 23, 2000. The TOWN issued building permits for five-story condominium buildings on August 20, 2000, October 24, 2000, January 3, 2001, April 17, 2001, May 17, 2001, and July 13, 2001. The TOWN issued building permits for four-story condominium buildings on June 13, 2001.

10. The TOWN amended and re-adopted its charter in 1990. This charter sets forth the same building height limitation of thirty-five feet with no exemptions or exceptions.

11. The TOWN council adopted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height restriction.

12. On May 21, 2001, a Fourth Amendment to the Development Agreement was executed by the parties. It stated that of the seven hundred feet of ocean frontage, four hundred feet could be developed with buildings up to seventy feet high and three hundred feet would be developed with buildings not in excess of thirty-five feet. This fourth amendment included four additional lots (having ocean frontage of 100 feet each) north of the "Beach Club." PONCE LIGHTHOUSE represented to the TOWN in its application for "Future Land Use Map Change, P.U.D. Amendment and Overall Development Plan" dated February 14, 2001 that the four additional lots (two of which were owned by Messrs DiFranco and Bochese) " . . . have either [been] purchased or are under contract to be purchased by Ponce Lighthouse Properties, Inc." The definition

of "Planned Unit Development" in the TOWN's Land Use and Development code is "A tract of land under unified ownership. . . ." Section 5.5.12(I) of the TOWN's Land Development Code provides that, at the time of applications related to a P.U.D., the applicant or contract seller must have unified ownership over the entire area within the P.U.D., and that unified ownership shall thereafter be maintained until after the recording of the overall development plan or final plat. Amendments to the development agreements are subject to final approval by the TOWN council.

13. Of the four additional beachfront lots included within the Fourth Amendment to Development Agreement, two (the DiFranco and Bochese lots) were not owned by the Developer, PONCE LIGHTHOUSE, at the time of application for amendment to the P.U.D. nor are they owned by the Developer to date. On or about December 31, 2001, Mr. DiFranco corresponded with the TOWN requesting that his property be removed from the P.U.D.

14. On or about December 1, 2001, an amended charter for the TOWN took effect. It states "Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet."

15. On February 27, 2002, the TOWN council adopted a resolution and a Fifth Amendment to the Development Agreement. The Fifth Amendment rescinded the Fourth Amendment which had been executed by the parties on May 21, 2001. Among the council's stated reasons adopting the Fifth Amendment rescinding the Fourth Amendment was the following: PONCE LIGHTHOUSE's false representation that it owned or maintained contracts to purchase the DiFranco and Bochese properties.

This violated the provisions of the requirement for unified ownership set forth in the Land Development Code. At the time of the effective date of the rescission, PONCE LIGHTHOUSE did not possess a contract to purchase the DiFranco property.

16. The Fifth Amendment to the Development Agreement was executed by the TOWN and PONCE LIGHTHOUSE on March 7, 2002. It rescinds the Fourth Amendment. It removed the four beachfront parcels from the P.U.D. and restored the status of the provisions relating to the Beach Club parcel as provided in the Third Amendment dated November 25, 1996. That Third Amendment set forth the following provisions relating to the Beach club property at issue herein:

> The maximum building height for the beach club will be thirty-five (35) feet. The building set back from the south property line shall be twenty-five (25) feet. The residential lot shall have a maximum building height of twenty-five 25) feet and side lot set back of ten (10) feet on the north property line and ten (10) feet on the south property line.

FACTS AS TO THE GORDIS PRESTON LINE

1. Ordinance 85-27 adopted on or about November 20, 1985, at section 700.13, established a twenty-five foot setback from any P.U.D. perimeter such that the Atlantic Ocean bulkhead is considered part of such perimeter.

2. On or about June 19, 1991, the TOWN approved Ordinance 91-10 amending Ordinance 85-27 regarding the construction setback from the Atlantic Ocean. This ordinance states in pertinent part the following:

WHEREAS, the Town Council finds that existing principal structures located on oceanfront property have been constructed in uniformity to each other in many cases thereby preserving riparian rights to the light, air and view of the Atlantic Ocean, and

WHEREAS, the existing zoning regulations of the Town of Ponce Inlet in some situations would permit the construction of principal residences on oceanfront properties in such a manner so as to not be in uniformity with preexisting principal structures, and

WHEREAS, the Town Council finds that it is in the best interest of the Town and the citizens of the Town to establish a method for determining a setback line for the construction of principal structures so that the setback of principal structures to be constructed in the future will be uniform with preexisting principal structures already constructed on oceanfront property.

(2) Setback line shall mean "a straight line determined by a sealed land survey, connecting the seaward most portions of the closest adjacent principal structures to the north and south of the proposed construction site."

(3) The applicant for a permit for construction on any property within the Town of Ponce Inlet, Florida abutting the Atlantic Ocean shall provide as a part of said application, a survey identifying the setback line and the proposed structures.

This ordinance is commonly referred to as the "Gordis-Preston Line."

3. The Land Use and Development Code incorporates the Gordis-Preston Line at section 5.6.3. The code at

section 5.5.8 has always contained a minimum setback from all waterfront of twenty-five feet for all other zoning categories.

4. On June 25, 2001, PONCE LIGHTHOUSE submitted an application to the TOWN for construction of a seven-story condominium on the subject property site. The proposed principal structure would extend easterly beyond the Gordis Preston Line as defined by the existing structures to the north and south. This would interfere with the ocean view of residents in existing structures to the north and south. The TOWN's Development Review Team conducted a review of the proposed plans and reported on June 9, 2001 that the plan must "show the principal structure conforms with the Coastal Construction Setback Line (*Gordis Preston Line*)." On July 11, 2001, the TOWN's representative, Mr. Ron Thommason, notified PONCE LIGHTHOUSE that no principal structure was to extend seaward of the "Gordis-Preston" line.

5. On November 12, 2001, PONCE LIGHTHOUSE's engineer corresponded with the TOWN to request a variance from the waterfront setback requirement (the Gordis Preston line). The request recited his opinion that a "strict application of this set-back would result in an unreasonable and undue hardship." At hearing before the court, the attorney for PONCE LIGHTHOUSE advised that moving the principal structure westerly (to conform with the Gordon Preston Line) would cause the planned parking area to conflict with the right-of-way of South Atlantic Avenue. PONCE LIGHTHOUSE believes this would be unreasonable and create undue hardship upon it.

6. There is no allegation in the counter-petition, nor has the fact been established, that the TOWN has made a

final administrative determination as to the request for variance by PONCE LIGHTHOUSE.

DISCUSSION AND ORDER

The parties have submitted for argument and determination their respective motions for declaratory judgment upon (1) whether PONCE LIGHTHOUSE has the right to build a structure to a height in excess of thirty-five feet, in apparent violation of the charter, and (2) whether Ordinance 91-10, the Gordis Preston Line, is unconstitutional as applied to the property of PONCE LIGHTHOUSE.

The provisions of Fla. Stat. s.86.011 (2002) state that the circuit court has jurisdiction to declare rights, status, and other legal or equitable relations. Furthermore, Fla. Stat. s.86.021 provides that any person having doubt about his or her rights in regard to a statute or municipal ordinance may secure a declaration of rights or status thereunder. However, parties, such as landowners, challenging the validity of an ordinance as applied specifically to their property must exhaust their administrative remedies before resorting to the courts. *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So.2d 593 (Fla. 5th DCA 2001). See, *e.g.*, *City of Gainesville v. Republic Investment Corp.*, 480 So.2d 1344 (Fla. 1st DCA 1986) (Held: improper for court to enter declaratory judgment where city had not reviewed and acted upon the final site plans); *City of DeLand v. Lowe*, 544 So.2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So.2d 461 (Held: Plaintiff failed to exhaust administrative remedies prior to filing suit in circuit court, and it was error to refuse to dismiss the premature suit).

In order to challenge a city ordinance as being unconstitutional, Fla. Stat. s.86.091 (2002) requires that the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. In the instant matter, PONCE LIGHTHOUSE has filed a return of service of counterclaim summons upon the "agency clerk" for the Honorable Bob Butterworth, Attorney General. However, the court finds that no service has been effected upon the Attorney General of subsequent pleadings or of the hearing notice for the very Declaratory Judgment hearing held on January 17, 2003.

There being inadequate notice of these proceedings to the Attorney General, and, furthermore, there being no proof of PONCE LIGHTHOUSE having exhausted its administrative remedies, the Counter-Petition for Declaratory Judgment as to the constitutionality of ordinance 91-10 is hereby **DENIED**, and Count II of the Second Counterclaim for Declaratory Judgment (challenge to the Gordis Preston Line) is **DISMISSED, without prejudice**.

The TOWN charter must be interpreted and applied in much the same way as the state or federal constitution. See, *Luers v. Kuykendall*, 185 So. 448 (Fla. 1938). "The legislative municipal charter is to the municipality to all intents and purposes what the State Constitution is to the state." Id., at 451. In essence, unless the charter directly conflicts with state or federal law, it will be upheld. See, Fla. Stat. s.166.021(3) (2002). An act by the town council performed in contravention to the charter is *ultra vires* and wholly void. See, *A.O. Edwards v. Town of Lantana*, 77 So.2d 245 (Fla. 1955).

Here, the electorate of the TOWN, at a duly called referendum, amended the charter to add a specific height limitation to all building within the town. See, Fla. Stat. s.166.031 (2002). The very ordinance calling for the amendment recited rational, good and sufficient reasons for such a limitation. The parties have not argued that such a limitation conflicts with any provision of state or federal law, and the court finds no such conflict. The height limitation controlled all building within the town upon its adoption. Therefore, the TOWN council's subsequent adoption of ordinance 84-11 on May 9, 1984 and ordinance 86-12 on July 14, 1986, to the extent such ordinances contradicted the height limitation, was *ultra vires*. Nothing in the charter amendment permitted such a modification to the amendment as adopted by the electorate. Every act of a municipality, through its ordinances, must be within the powers expressly or impliedly conferred and must not conflict with any provision of law. See, *Hardee v. Brown*, 47 So. 834 (Fla. 1908). Furthermore, adoption of a Fourth Amendment to Development Agreement on May 21, 2001 also was *ultra vires* and of no force and effect. It, too, violated the specific height limitation set forth in the TOWN charter. PONCE LIGHTHOUSE's argument that it possessed a "vested interest" in building to a height of seven stories cannot stand. The citizens of Ponce Inlet have the power to change their charter to incorporate a height limitation. Even had a building permit been issued, such a permit does not create a vested right in PONCE LIGHTHOUSE. See, *City of Boynton Beach v. Carroll*, 272 So.2d 171 (Fla. 4th DCA 1973), *cert. den.* 279 So.2d 871; and *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170 (Fla. 1983) (discussing the referendum power set forth in the Florida Constitution). Furthermore, although the claim of estoppel raised by PONCE

LIGHTHOUSE may be appealing from a moral standpoint, it cannot survive where the charter provided no authority to the council to act in the manner it did. *Edwards, supra*, at 246.

By reason of the foregoing facts, and considering the applicable law, it is thereupon **Adjudged and Decreed** as follows:

1. All ordinances or contractual undertakings adopted by the TOWN OF PONCE INLET council in violation of the thirty-five foot height limitation after the charter amendment of November 29, 1983, were *ultra vires* and void, to the extent they conflicted with the height limitation.

2. The Petitioner, TOWN OF PONCE INLET, through its council, properly enacted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height limitation.

3. The Petitioner, TOWN OF PONCE INLET, through its council, properly adopted a resolution and a Fifth Amendment to the Development Agreement on February 27, 2002, thereby re-establishing the thirty-five foot height limitation to the Beach Club property.

DONE AND ORDERED in chambers at Daytona Beach, Florida this 17th day of March, 2003.

/s/ _____
J. DAVID WALSH
Circuit Court Judge

Copies to: Peter B. Heebner, Esquire
Theodore R. Doran, Esquire
Michael Dyer, Esquire
Michael J. Roper, Esquire
Ernest H. Kohlmyer, III, Esquire
Mathew D. Staver, Esquire

APPENDIX B

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

THE TOWN OF PONCE INLET, FLORIDA, a municipal corporation of the State of Florida

Petitioner,

vs.

CASE No. 2002-30561 CICI (32)

PONCE LIGHTHOUSE PROPERTIES, INC., a Florida corporation, et al.,

Respondents, /

SUBSTITUTED ORDER ON PETITIONS FOR DECLARATORY JUDGMENT

Upon consideration of motions for rehearing and responses thereto, including arguments held on this date, the Order on Petitions for Declaratory Relief entered March 17, 2003 is Withdrawn and the following is substituted therefor.

THIS CAUSE came on before the court on January 17, 2003, to consider the following matters: Petition for Declaratory Relief filed by the Petitioner, TOWN OF PONCE INLET, on March 7, 2002, joined in by Respondents, TOWERS VII CONDOMINIUM ASSOCIATION, INC., MICHAEL DiFRANCO, ELIZABETH DiFRANCO, DAVID JACOBS and ANN JACOBS, by Answer filed May 6, 2002; and Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., Counter-petition for Declaratory

Relief and Injunctive Relief filed April 10, 2002. Counsel for the parties having been present and heard, and the court having read the supporting memoranda and authorities cited and being duly advised in the premises, finds as follows:

The parties have stipulated to the majority of the material facts in this case. The court also has considered the numerous exhibits admitted by the parties for the purpose of confirming and supplementing the admitted facts as necessary. These material facts are set out below.

FACTS AS TO THE HEIGHT RESTRICTION

1. The Petitioner, TOWN OF PONCE INLET, (hereinafter "TOWN") was formed in 1963 under a model charter which did not address planning or zoning issues. Rather, the charter at Article X, deferred all planning decisions to the Town Council and all zoning decisions to the South Peninsula Zoning Board. The Zoning Board enacted Resolution 74-14 to serve as zoning regulations for the TOWN. The Zoning Board later enacted Resolution 74-22 to zone certain property owned by the Teachers Retirement System of Georgia as a Planned Unit Development ("P.U.D".)

2. Respondent, PONCE LIGHTHOUSE PROPERTIES, INC., (hereinafter "PONCE LIGHTHOUSE") is the current record owner of a parcel of realty, approximately 178 acres in size, which was zoned by P.U.D. by Resolution 74-22. The sub-parcel at issue herein is described as the "Beach Club" consisting of approximately three hundred feet of oceanfront property within the TOWN.

3. On or about October 13, 1976, the TOWN council passed Resolution 76-18 amending Resolution 74-22 to limit the height of residential buildings to seven stories. It also adopted previous actions of the South Peninsula Zoning Board.

4. On or about September 14, 1977, the TOWN adopted Ordinance 77-10. This ordinance created zoning regulations within the town. It also set forth building height limitations for P.U.D.'s at seventy feet and no more than seven stories north of Inlet Harbor Road and no more than thirty-five feet south of Inlet Harbor Road.

5. On or about August 24, 1983, the TOWN Council passed Ordinance 83-012. This ordinance placed a proposed amendment to the Charter before the electors of the TOWN at a referendum to be held in November 1983. The proposed amendment is quoted as follows: "(a) Shall the Charter of the town of Ponce Inlet, Florida, be amended to limit all buildings in the Town to a maximum height of thirty-five (35') feet?" The ordinance recited several reasons supporting the restriction one of which was that "a proliferation of buildings exceeding thirty-five (35') in height will negatively impact the quality of life within the Town of Ponce Inlet." The proposed amendment was approved by a majority of the electors at the referendum held November 8, 1983. It became effective on November 29, 1983 upon filing with the Florida Secretary of State. The subject charter amendment was incorporated into the revised charter of the Town of Ponce Inlet effective January 16, 1984. Town Charter Article VII (Zoning), at Section 7.02 (Height limitation), reads as follows:

> Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet.

The charter amendment contained no exemptions, exclusions or other language limiting that height restriction.

6. On May 9, 1984, the TOWN council adopted Ordinance 84-11. The ordinance created an exception to the charter amendment of November 8, 1983 stating that the thirty-five foot height limitation would not apply to property zoned "T-1" as of November 8, 1983 nor to properties developed with buildings or buildings under construction with an existing or planned height greater than thirty-five feet but not more than seventy feet. The council stated in the ordinance that it was the "interpretation of the Town Council that the charter amendment adopted by the electors does not require that the property presently zoned to permit buildings of a height in excess of thirty-five (35') feet shall be restricted in the future to prohibit buildings of a height no greater than thirty-five (35') feet. . . ." It states:

> (c) Properties zoned Planned Unit Development (P.U.D.) may be developed under the terms and provisions of applicable P.U.D. agreements between the Town and property owner, or developer of property classified P.U.D. as of November 8, 1983.

7. On or about November 20, 1985, the TOWN approved Ordinance 85-27 which established new zoning regulations for the Town. It repealed Ordinance 77-10 and incorporated any orders or resolutions pertaining to P.U.D.'s and Ordinances 84-10 and 84-11. Section 700.09 entitled "T-1, Tourist Accommodations," under the subsection "Maximum Building Height," states "35 feet, except that the maximum building height shall be 70 feet in all districts that existed prior to the effective date of Ordinance 84-11 implementing the referendum of November 8,

1983 that restricted building height to 35 feet. The provisions of Ordinance 84-11 shall not be affected and shall remain in full force and effect."

8. On or about July 14, 1986, the TOWN council adopted Ordinance 86-12. It approved the Development Agreement with PONCE LIGHTHOUSE's predecessors in title. It was signed by the mayor, all members of the Town council and the developer. Paragraph one, states the following:

> However, it is understood by all the parties hereto that the Developer retains vested rights to the P.U.D. zoning and all of the prior terms and conditions of that zoning, except as amended by this Agreement, and that by entering into this Agreement, there is no waiver of any prior terms and conditions or vested rights in the zoning and terms and conditions attached thereto.

Paragraph six states the following:

> It is understood and agreed by the parties hereto that the amendments to the Town's Charter restricting the height of buildings constructed within the municipal limits to thirty-five feet (35') do not apply to the P.U.D. To the extent that there is a specific conflict between this Agreement and existing Town Resolutions and regulations, this Agreement shall control. The Developer agrees to be bound by all other applicable provisions of the Town's Zoning Ordinance not in conflict with this Development Agreement and other applicable Ordinances, including the Subdivision Ordinance and the Stormwater and Conservation Ordinance in force as of the date of the execution of this Agreement, or future amendments of said Ordinances where not inconsistent

> with this Agreement. This Agreement may be amended by mutual agreement of the parties, their heirs, successors, or assigns.

Paragraph twenty states the following:

> Unless otherwise specified in this Agreement, the ocean-front section of the P.U.D. . . . will be developed in accordance with the requirements set forth in the Zoning Ordinance of the Town of Ponce Inlet (Ordinance No.85-27) in category "T-1", Tourist Accommodation, in force at the time of this Agreement. The maximum building widths will be two hundred fifty feet (250'). The minimum separation between buildings will be fifty-five feet (55'). However, building separation will be maximized whenever possible. The building height shall be the minimum required to allow construction of buildings having the first floor parking, plus seven (7) stories of apartments, with nine foot (9') ceilings, a rust roof and standing elevator equipment facilities. The actual building height will not exceed eighty-five feet (85') from the existing ground level.

The Development Agreement was modified and recorded in the public records of Volusia County in December 1993 (the First Amendment); March 1996 (the Second Amendment); and November 1996 (the Third Amendment). The Third Amendment states the following regarding the Beach Club property:

> The maximum building height for the beach club will be thirty-five (35) feet. . . .

9. The TOWN issued building permits to developers other than PONCE LIGHTHOUSE that allowed construction of seven-story condominium buildings on the following

dates: June 15, 1988; December 29, 1988; August 2, 1990; March 19, 1992; December 31, 1992; February 25, 1994; December 4, 1995; June 17, 1997; January 14, 1998; December 17, 1998; August 26, 1999, and May 21, 2002. The TOWN issued building permits to build a cellular telephone tower to a height in excess of thirty-five feet on August 23, 2000. The TOWN issued building permits for five-story condominium buildings on August 20, 2000, October 24, 2000, January 3, 2001, April 17, 2001, May 17, 2001, and July 13, 2001. The TOWN issued building permits for four-story condominium buildings on June 13, 2001.

10. The TOWN amended and re-adopted its charter in 1990. This charter sets forth the same building height limitation of thirty-five feet with no exemptions or exceptions.

11. The TOWN council adopted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height restriction.

12. On May 21, 2001, a Fourth Amendment to the Development Agreement was executed by the parties. It stated that of the seven hundred feet of ocean frontage, four hundred feet could be developed with buildings up to seventy feet high and three hundred feet would be developed with buildings not in excess of thirty-five feet. This fourth amendment included four additional lots (having ocean frontage of 100 feet each) north of the "Beach Club." PONCE LIGHTHOUSE represented to the TOWN in its application for "Future Land Use Map Change, P.U.D. Amendment and Overall Development Plan" dated February

14, 2001 that the four additional lots (two of which were owned by Messrs DiFranco and Bochese) " . . . have either [been] purchased or are under contract to be purchased by Ponce Lighthouse Properties, Inc." The definition of "Planned Unit Development" in the Town's Land Use and Development code is "A tract of land under unified ownership. . . ." Section 5.5.12(I) of the TOWN's Land Development Code provides that, at the time of applications related to a P.U.D., the applicant or contract seller must have unified ownership over the entire area within the P.U.D., and that unified ownership shall thereafter be maintained until after the recording of the overall development plan or final plat. Amendments to the development agreements are subject to final approval by the TOWN council.

13. Of the fourth additional beachfront lots included within the Fourth Amendment to Development Agreement, two (the DiFranco and Bochese lots) were not owned by the Developer, PONCE LIGHTHOUSE, at the time of application for amendment to the P.U.D. nor are they owned by the Developer to date. On or about December 31, 2001, Mr. DiFranco corresponded with the TOWN requesting that his property be removed from the P.U.D.

14. On or about December 1, 2001, an amended charter for the TOWN took effect. It states "Building within the Town of Ponce Inlet shall be limited to a maximum height of thirty-five (35) feet."

15. On February 27, 2002, the TOWN council adopted a resolution and a Fifth Amendment to the Development Agreement. The Fifth Amendment rescinded the Fourth Amendment which had been executed by the parties on May 21, 2001. Among the council's stated

reasons adopting the Fifth Amendment rescinding the Fourth Amendment was the following: PONCE LIGHTHOUSE's false representation that it owned or maintained contracts to purchase the DiFranco and Bochese properties. This violated the provisions of the requirement for unified ownership set forth in the Land Development Code. At the time of the effective date of the rescission, PONCE LIGHTHOUSE did not possess a contract to purchase the DiFranco property.

16. The Fifth Amendment to the Development Agreement was executed by the TOWN and PONCE LIGHTHOUSE on March 7, 2002. It rescinds the Fourth Amendment. It removed the four beachfront parcels from the P.U.D. and restored the status of the provisions relating to the Beach Club parcel as provided in the Third Amendment dated November 25, 1996. That Third Amendment set forth the following provisions relating to the Beach club property at issue herein:

> The maximum building height for the beach club will be thirty-five (35) feet. The building set back from the south property line shall be twenty-five (25) feet. The residential lot shall have a maximum building height of twenty-five (25) feet and side lot set back of ten (10) feet on the north property line and ten (10) feet on the south property line.

FACTS AS TO THE GORDIS PRESTON LINE

1. Ordinance 85-27 adopted on or about November 20, 1985, at section 700.13, established a twenty-five foot setback from any P.U.D. perimeter such that the Atlantic Ocean bulkhead is considered part of such perimeter.

2. On or about June 19, 1991, the TOWN approved Ordinance 91-10 amending Ordinance 85-27 regarding the construction setback from the Atlantic Ocean. This ordinance states in pertinent part the following:

> WHEREAS, the Town Council finds that existing principal structures located on oceanfront property have been constructed in uniformity to each other in many cases thereby preserving riparian rights to the light, air and view of the Atlantic Ocean, and
>
> WHEREAS, the existing zoning regulations of the Town of Ponce Inlet in some situations would permit the construction of principal residences on oceanfront properties in such a manner so as to not be in uniformity with pre-existing principal structures, and
>
> WHEREAS, the Town Council finds that it is in the best interest of the Town and the citizens of the Town to establish a method for determining a setback line for the construction of principal structures so that the setback of principal structures to be constructed in the future will be uniform with pre-existing principal structures already constructed on oceanfront property.
>
> (2) Setback line shall mean "a straight line determined by a sealed land survey, connecting the seaward most portions of the closest adjacent principal structures to the north and south of the proposed construction site."
>
> (3) The applicant for a permit for construction on any property within the Town of Ponce Inlet, Florida abutting the Atlantic Ocean shall provide as a part of said application, a survey identifying the setback line and the proposed structures.

This ordinance is commonly referred to as the "Gordis-Preston Line."

3. The Land Use and Development Code incorporates the Gordis-Preston Line at section 5.6.3. The code at section 5.5.8 has always contained a minimum setback from all waterfront of twenty-five feet for all other zoning categories.

4. On June 25, 2001 PONCE LIGHTHOUSE submitted an application to the TOWN for construction of a seven-story condominium on the subject property site. The proposed principal structure would extend easterly beyond the Gordis-Preston Line as defined by the existing structures to the north and south. This would interfere with the ocean view of residents in existing structures to the north and south. the TOWN's Development Review Team conducted a review of the proposed plans and reported on July 9, 2001 that the plan must "show the principal structure conforms with the Coastal Construction Setback Line (Gordis Preston Line)." On July 11, 2001, the TOWN's representative, Mr. Ron Thommason, Notified PONCE LIGHTHOUSE that no principal structure was to extend seaward of the "Gordis-Preston" line.

5. On November 12, 2001, PONCE LIGHTHOUSE's engineer corresponded with the TOWN to request a variance from the waterfront setback requirement (the Gordis Preston line). The request recited his opinion that a "strict application of this set-back would result in an unreasonable and undue hardship." At hearing before the court, the attorney for PONCE LIGHTHOUSE advised that moving the principal structure westerly (to conform with the Gordon Preston Line) would cause the planned parking area to conflict with the right-of-way of South

Atlantic Avenue. PONCE LIGHTHOUSE believes this would be unreasonable and create undue hardship upon it.

6. There is no allegation in the counter-petition, nor has the fact been established, that the TOWN has made a final administrative determination as to the request for variance by PONCE LIGHTHOUSE.

DISCUSSION AND ORDER

The parties have submitted for argument and determination their respective motions for declaratory judgment upon (1) whether PONCE LIGHTHOUSE has the right to build a structure to a height in excess of thirty-five feet on the Beach Club property here in dispute, in apparent violation of the charter, and (2) whether Ordinance 91-10, the Gordis Preston Line, is unconstitutional as applied to the property of PONCE LIGHTHOUSE.

The provisions of Fla. Stat. s.86.011 (2002) state that the Circuit court has jurisdiction to declare rights, status, and other legal or equitable relations. Furthermore, Fla. Stat. is s.86.021 provides that any person having doubt about his or her rights in regard to a statute or municipal ordinance may secure a declaration of rights or status thereunder. However, parties, such as landowners, challenging the validity of an ordinance as applied specifically to their property must exhaust their administrative remedies before resorting to the courts. *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So.2d 593 (Fla. 5th DCA 2001). See, *e.g.*, *City of Gainesville v. Republic Investment Corp.*, 480 So.2d 1344 (Fla. 1st DCA 1986) (Held: improper for court to enter declaratory judgment where city had not reviewed and acted upon the final site plans); *City of DeLand v.*

Lowe, 544 So.2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So.2d 461 (Held: Plaintiff failed to exhaust administrative remedies prior to filing suit in circuit court, and it was error to refuse to dismiss the premature suit).

In order to challenge a city ordinance as being unconstitutional, Fla. Stat. s.86.091 (2002) requires that the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. In the instant matter, PONCE LIGHTHOUSE has filed a return of service of counterclaim summons upon the "agency clerk" for the Honorable Bob Butterworth, Attorney General. However, the court finds that no service has been effected upon the Attorney General of subsequent pleadings or of the hearing notice for the very Declaratory Judgment hearing held on January 17, 2003.

There being inadequate notice of these proceedings to the Attorney General, and, furthermore, there being no proof of PONCE LIGHTHOUSE having exhausted its administrative remedies, the Counter-Petition for Declaratory Judgment as to the constitutionality of ordinance 91-10 is hereby **DENIED**, and Count II of the Second Counterclaim for Declaratory Judgment (challenge to the Gordis Preston Line) is **DISMISSED, without prejudice**.

The TOWN charter must be interpreted and applied in much the same way as the state or federal constitution. See, *Luers v. Kuykendall*, 185 So. 448 (Fla. 1938). "The legislative municipal charter is to the municipality to all intents and purposes what the State Constitution is to the state." Id., at 451. In essence, unless the charter directly conflicts with state or federal law, it will be upheld. See, Fla. Stat. s.166.021(3) (2002).

Here, the electorate of the TOWN, at a duly called referendum, amended the charter to add a specific height limitation to all building within the town. See, Fla. Stat. s.166.031 (2002). The very ordinance calling for the amendment recited rational, good and sufficient reasons for such a limitation. The parties have not argued that such a limitation conflicts with any provision of state or federal law, and the court finds no such conflict.

The Town council properly repealed Ordinance 84-11 on April 18, 2001 by the adoption of Ordinance 2001-08, thus leaving the charter height limitation of 35 feet in effect as to the Beach Club property.

The Town Council properly repealed the Fourth Amendment to the Development Agreement on February 27, 2002 and properly adopted the Fifth Amendment. This action left in effect the Third Amendment to the Development Agreement regarding the Beach Club phase, which limited construction on that phase to 35 feet. The developer accepted that Amendment. Thus, no claim of estoppel is warranted.

That being the case, the Charter prohibits Ponce Lighthouse Properties, Inc. from now building higher than 35 feet on the Beach Club property. The Fifth Amendment ratified the authority of the Developer to complete other properties, specifically The Links, to a height of 70 feet as approved under the Fourth Amendment, notwithstanding Ordinance 2001-08.

By reason of the foregoing facts, and considering the applicable law, it is thereupon **Adjudged and Decreed** as follows:

1. The Petitioner, TOWN OF PONCE INLET, through its council, properly enacted Ordinance 2001-08 on or about April 18, 2001. This ordinance repealed Ordinance 84-11 in its entirety, and amended the Land Use and Development Code to eliminate all exceptions to the thirty-five foot height limitation not otherwise authorized by Development Agreements for pre-existing PUD's.

2. Ordinance 84-11 was not ultra vires because it was validly enacted by a body with constitutional and statutory authority to do so. See Sec. 163.3201, Fla. Stat. (1983). It is unnecessary to adjudicate its validity because it stood repealed at the time of the Complaint for declaratory relief.

3. At the time of repeal of Ordinance 84-11 and the approval of the Fifth Amendment, no construction had yet begun on the properties zoned T-1 added to the PUD, and regardless of any vested rights of the PUD, no such estoppel rights attended the added property, and the Town is entitled to declaratory relief that the development proposed by the Respondent Ponce Lighthouse Properties Inc., east of Atlantic Avenue only, is subject to the 35 foot height limit.

4. This Order has no effect on any other property as to which construction is under way or complete. Existing permits, master permits or certificates of occupancy as to such construction are not subject to collateral attack where no direct challenge was timely filed.

DONE AND ORDERED in chambers at Daytona Beach, Florida this 11th day of April, 2003.

/s/ _____
J. DAVID WALSH
Circuit Court Judge

Copies to: Peter B. Heebner, Esquire
Theodore R. Doran, Esquire
Michael Dyer, Esquire
Michael J. Roper, Esquire
Ernest H. Kohlmyer, III, Esquire
Mathew D. Staver, Esquire

APPENDIX C

IN THE CIRCUIT COURT
OF THE SEVENTH
JUDICIAL CIRCUIT IN
AND FOR VOLUSIA
COUNTY, FLORIDA

CASE NO.: 2004-30574
CIC 32

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET,
a municipal corporation
organized under the laws of
the State of Florida,

Defendant /

COMPLAINT
TAKINGS CLAIM UNDER BERT J. HARRIS

(Filed Apr. 1, 2004)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, sues the Defendant, THE TOWN OF PONCE INLET, for inordinately burdening his vested rights which has resulted in a partial taking.

JURISDICTIONAL BASIS OF THE CLAIMS

1 This action is brought pursuant to Chapter 70, Florida Statutes as a result of the Defendant inordinately burdening the Plaintiff's vested rights and property interests such as the value of his ownership interests and

the right to build to a 70ft building height resulting in a partial taking of his property.

2 Pursuant to Chapter 70, Florida Statutes, notice of this claim and an appraisal has been provided to the TOWN OF PONCE INLET more than six months prior to filing this complaint. All pre-suit requirements pursuant to *Fla. Stat.* 70.001 have been met. (See Attached Exhibit)

3 This is an action for damages in excess of fifteen thousand dollars ($15,000.00).

4 On or about March 3, 2004, an order was entered in the U.S. District Court, Orlando Division dismissing this claim for lack of subject matter jurisdiction.

5 The Plaintiff, ALFRED L. BOCHESE, (hereinafter "BOCHESE") at all relevant times was a resident of the TOWN OF PONCE INLET, located in Volusia County, Florida and the owner of a residential structure located at 4671 S. Atlantic Ave., Ponce Inlet, Florida, which is the property in controversy.

6 The Defendant, TOWN OF PONCE INLET, (hereinafter "the TOWN") is an incorporated municipality empowered by and deriving its authority from Section 2, Article 8 of the Florida Constitution and *Fla. Stat.* Chapter 166.

GENERAL ALLEGATIONS

7 At all relevant times BOCHESE was a retired citizen who owned and resided in a single-family residence on an ocean front lot located at 4671 S. Atlantic Ave., Ponce Inlet, Florida. BOCHESE'S property, which was zoned T1 as of January 1, 1983 through May 26, 2001.

Under the T1 zoning classification, a property owner enjoyed a grandfathered right to build to a height of 70 ft. pursuant to the TOWN'S Comprehensive Plan. This grandfathered right was also statutorily provided for in TOWN Ordinance 84-11, as required pursuant to Florida Statutes § 471 and TOWN Charter Provision § 7.01.

8 On April 17, 2001, the TOWN repealed its zoning Ordinance 84-11 in violation of its Comprehensive Plan, its Charter and Florida Statutes and imposed a building height limitation of 35ft. on all properties within the TOWN.

9 BOCHESE'S property was substantially surrounded by similarly situated properties located in the PUD zoning district, which permitted the highest intensive use compared to any other zoning classification in TOWN. The TOWN rezoned his property to PUD on May 26, 2001 when it adopted the Fourth Amended Development Agreement for the Planned Unit Development Agreement (PUD) in the TOWN.

10 In reliance of the TOWN'S act of re-zoning of his property to PUD and its subsequent representations that the more favorable and flexible PUD zoning regulations and uses would be applied to his property such as the 70ft. building height allowance, on August 3, 2001. BOCHESE entered into a $950,000 dollar contract with an adjoining property owner and developer of the PUD for the sale of his property. Moreover, in further reliance of the same, BOCHESE decided not to challenge the repeal of the repeal of Ordinance 84-11 since his property was no longer zoned T1. The aforementioned action by the TOWN in the repeal of Ordinance 84-11 was rendered moot because BOCHESE re-obtained a 70ft building height allowance

and grandfathered status. BOCHESE also purchased another building lot for the purposes of constructing another residence and expanded significant time and money in generating the building plans for the new home site. Additionally, BOCHESE entered into a contract with a builder for the construction of his new home.

11 On February 27, 2002, the TOWN adopted Resolution 2000-10, rescinding the Fourth Amended Development Agreement which effectively again rezoned BOCHESE's property placing it back into the T1 zoning classification and thereby eliminating the right to build on his property to height of 70ft. While the resolution's stated purpose was to correct a rezoning error involving a neighboring property, the resolution also intentionally, unnecessarily and without any rational justification rezoned BOCHESE'S property and impaired his valuable property interests such as the value of his ownership and other vested rights such as the right to build to 70ft.

12 The TOWN also claimed that the Fourth Amended Development Agreement was illegal since the Fourth Amended Development Agreement permitted 70ft-building heights in violation of the TOWN'S Charter provision, which prohibited building heights above 35ft. In its deliberation, the TOWN failed to acknowledge that Ordinance 83-12, the ordinance that placed the 35ft. height limitation on the ballot for the voters to consider as a charter amendment in 1983 was not properly noticed pursuant to Florida Statutes 166 and thereby was illegal.

13 Additionally, the TOWN failed to take into account that its application of the 35ft. height restriction to BOCHESE'S property also violated its own Comprehensive Plan and State law, which also rendered it illegal.

14 While the developer of the PUD and the TOWN litigated the Charter restriction of 35ft. and the validity of Ordinance 84-11, in *The Town of Ponce Inlet v. PLPL* the court never reached the issues subsequently raised by the PUD developer that asserted that the original Charter amendment in 1983 was void since it failed to comply with the notice requirements of *Fla. Stat.* 166 or that the repeal of Ordinance 84-11 violated State law and the TOWN Charter.

15 BOCHESE discovered in deposition testimony obtained in October 2003 that the aforementioned issues were never decided by the court since the PUD developer was forced to settle the litigation based on the TOWN'S threats that it would seek to demolish millions of dollars in existing construction by the developer if the developer did not settle. BOCHESE also discovered that the settlement agreement with the TOWN contained a confidentiality provision. Accordingly, BOCHESE never had an opportunity to fully and fairly litigate the 70ft building height controversy.

16 As alleged, the down zoning-spot zoning of BOCHESE'S property by the TOWN has inordinately burdened BOCHESE'S vested rights, such as the value of his ownership and the right to build to 70ft. and has impaired his lawful rights to use his property resulting in a taking of his property within the meaning of Fla. Stat. Chapter 70.

WHEREFORE, ALFRED L. BOCHESE demands damages against the Defendant, attorneys fees, costs and trial by jury.

Dated this 31 day of March, 2004.

/s/ Paul M. Meredith
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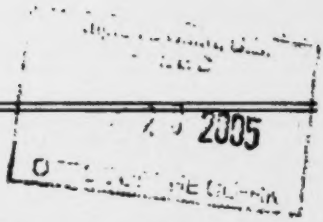
No. 05-62



In The

Supreme Court of the United States

ALFRED L. BOCHESE,

Petitioner,

vs.

TOWN OF PONCE INLET, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

Bochese's petition presents the critical issue as to whether there are common law contract exceptions to the well-established Constitutional principle that landowners have standing to challenge zoning actions that arbitrarily and unreasonably cause the diminution in the value of their property. The Eleventh Circuit created an exception to over a century of jurisprudence providing standing when it held, *sua sponte,* that unless a person is a third-party beneficiary to development agreement between a developer and a local government, a landowner lacks standing to challenge arbitrary and unreasonable governmental action even when such governmental action would cause the diminution to the value of that landowner's property. As we have demonstrated in the petition, governmental action that involves rezoning property due to the disposition of a development agreement does not change the character of that action. Such action is still a governmental zoning action and cannot circumvent the commands of the U.S. Constitution. To hold otherwise would allow a state's common law of contracts to preempt the Constitution. As demonstrated, the Eleventh Circuit, in holding to the contrary, created a large exception to standing under *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) and Florida law and eliminated governmental responsibility of having to defend claims of arbitrary and irrational conduct that is contrary to the holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In addition to creating the exception to standing, we demonstrated in the petition that the court of appeals also eliminated Rules 10(c) and 15(b) and did so by raising issues *sua sponte* in a manner that is in conflict with other

Circuits and the decisions of this Court to offend due process.

The Town's brief in opposition avoids, for the most part, discussion of the three critical substantive and procedural due process questions presented in the petition for writ of certiorari. Instead, the Town attempts to divert the Court's attention from review of these important issues by making material misstatements as to the procedural history of the case to eliminate the necessity of the court's review of the three questions presented. Petitioner respectfully asserts that if the Town is successful in this deceptive diversion, the published opinion of the Eleventh Circuit will render the Due Process clause of the Fourteenth Amendment nothing more than a distant and illusory promise, not only for Petitioner Bochese but also for any property owner rezoned pursuant to a development agreement.

It is important to note that Bochese originally filed his state takings claim under *Fla. Stat.* Chapter 70 as a supplemental claim in this case. The District Court declined to exercise supplemental jurisdiction over this claim and Bochese re-filed his state statutory claim in state circuit court. Both the federal questions and state statutory takings claim include allegations that Bochese has suffered a diminution in the value of his property based on the down zoning of his property to a zoning classification that no longer allowed a seventy-foot building height. Both the PUD and Bochese's previous T-1 zoning classification originally allowed and created a vested right of a seventy-foot building height pursuant to the Town's comprehensive plan and state law. In both cases, the thrust of Bochese's claims involve allegations that the Town engaged in arbitrary and irrational conduct by violating state law in

the elimination of the seventy-foot building height pursuant to the repeal of Ordinance 84-11. Such action by the Town violated its own comprehensive plan and policies and the procedural requirements for enacting zoning regulations under state law. Bochese raised these issues collectively in the amended complaint, in the joint pre-trial stipulation and in summary judgment proceedings. Florida law, as set forth in the petition, prohibits local governments from imposing land use restrictions inconsistent with the policy mandates of its own comprehensive plan. Bochese maintains that these allegations support his claim that he has suffered a concrete injury to entitle him to maintain an action for damages and equitable relief.

Misstatements by the Respondent

Bochese believes he has an obligation under the rules of this Court to point out to the Court the misstatements of the procedural history and law made by the Town in its brief in opposition that have a direct bearing on the issues presented in his Petition for Writ of Certiorari as to whether subject matter jurisdiction exists.

1. The Town, in its introduction, mischaracterizes the opinion of the Eleventh Circuit by claiming that the Court of Appeals recognized that the District Court properly granted summary judgment as to the merits of the case. To the contrary, the Court of Appeals reminded the District Court that it was not free to entertain the merits of the case since it had no subject matter jurisdiction. (*See* App. 14-15). The Eleventh Circuit panel held that since the District Court did not have subject matter jurisdiction it was not free to render even an advisory opinion on the merits. The District Court erroneously excluded Bochese's arguments relating to the seventy-foot height issue made

in opposition to the motion to summary judgment based on its improper invocation of the *Rooker-Feldman*[1] abstention Doctrine. Accordingly, because the District Court decided it lacked subject matter jurisdiction it could not have proceeded to decide the case on the merits and consider, in a factual vacuum, the Town's factual arguments made in its summary judgment motion and at the same time excluding Bochese's arguments because of subject matter jurisdiction.[2]

2. Most importantly, the Town also knowingly misrepresents the procedural history of the case by mischaracterizing the issues and claims that were before the Court of Appeals and the District Court. The Town asserts the opposite legal position in the state court alleging that Bochese's loss of the right to build to a seventy-foot right was litigated in the District Court. The Town argues to this Court that the Eleventh Circuit was correct in characterizing Bochese's allegations in his complaint as somewhat of a moving target. A review of the Town's affirmative

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[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983). Established the *Rooker-Feldman* Doctrine.

[2] The Town inappropriately and prematurely attempts to argue in its brief in opposition the factual merits of Bocheses's underlying claims since the merits of the case were not previously considered. The factual issue of whether Bochese was the victim of retaliation, received adequate procedural due process by the Town, or victimized along with his developer PLPI through alleged arbitrary and capricious or extortionate conduct and by false and defamatory resolutions claiming a lack of unified ownership resulting in the diminution in the value of his property should be decided for the first time on remand in District Court. The only issue before this court is whether the appellate and the District Court erred in determining that they lacked subject matter jurisdiction based on the three questions presented in the petition for writ of certiorari.

defenses, below, filed in the state court explains why. The Town plays the shell game. It asserts here that the only claim that Bochese has made in the District Court and the Court of Appeals arise solely out of the developer's contract with the Town. *See* Response Brief, p. 13. The Town asserts to this Court that Bochese has mischaracterized his claim by attempting to articulate new claims. The Town maintains that the Eleventh Circuit was correct in excluding Bochese's claim that he had suffered a diminution in value of his property based on the down zoning and the loss of his right to build to a seventy-foot building height. The Town has been less than candid with this Court.

When, shortly before entering summary judgment, the District Court dismissed the Florida Bert J. Harris Act claim that included the loss of the seventy-foot building height, Bochese immediately re-filed in state court. (*See* App. 131). The Town files with their reply brief that complaint but not their answer. The Town's third affirmative defense alleges that Bochese is collaterally estopped and barred by the doctrines of res judicata from maintaining his claim based on the summary judgment entered by the District Court on March 23, 2004, which decided the seventy-foot building height issue.

> "Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred by the doctrines of collateral estoppel and/or res judicata since the issue of the Town's height restriction governing this property was resolved by the Order on Town's Motion for Summary Judgment dated March 23, 2004 issued by Judge John Antoon in the case Alfred L. Bochese v. Town of Ponce Inlet, Florida, in the

United States District Court, Middle District of Florida, Orlando, Division Case No. 6:02-CV-01253-ORL-28-JGG." (*See* App. 133).

The Town has also served the undersigned with a safe harbor notice for sanctions under *Fla. Stat.* 57.105 together with a proposed motion for sanctions based on collateral estoppel. (*See* App. 121 and 124). The Town claims in its notice and proposed motion for sanctions that Bochese's state takings claim is frivolous on the basis that the seventy-foot issue had been decided by the District Court and by the Eleventh Circuit's affirmance from which Bochese seeks certiorari review. The doctrine of judicial estoppel should bar this type of chicanery. The Town also simply ignores the exhibits attached to the amended complaint that further make evident the issue regarding the loss of the seventy-foot building height was before the court. Attached to the First Amended Complaint as Exhibit D, the letter from the Town Attorney dated February 13, 2003 specifically acknowledged that Bochese's claim involved the repeal of Ordinance 84-11, which eliminated the seventy-foot building height use from the PUD and T-1 zoning classifications.[3] (*See* App. 128). The Town's assertion in its brief in opposition that this claim was not before the District Court can only be described as a sham.

3. The Town's assertion that there is no evidence in the record that the parties tried, by express consent, the

[3] The Town Attorney's letter also reveals that contrary to the Town's representation, the Town Council was given an additional chance to remedy its previous zoning action directed against Bochese but failed to do so. As such, Bochese had obtained a final decision and any future applications would have been an exercise in futility.

seventy-foot building height issue is also a misstatement because of the express language contained in the joint pre-trial statement. (*See* App. 121-128). The Town's assertion that it objected to this proposed amendment is also false in that it did not file a response to Bochese's motion to file a second amended complaint. Equally false is the Town's representation that the repeal of Ordinance 84-11 was not litigated by the Town in its motion for summary judgment. The Town, as a cornerstone of its motion for summary judgment, provided the District Court, as it has done in its appendix here, the order of the state circuit court holding that the Town's repeal of Ordinance 84-11 was valid since it was contrary to the Town Charter's thirty-five foot height limitation. The state court order expressly did not reach the question of whether the Town Charter provision restricting building height violated state or federal law.

Contrary to the assertions of the Town, the District Court refused to consider Bochese's claim of diminution in value based on the loss of the seventy-foot building height by invoking the *Rooker-Feldman* Doctrine, not because the magistrate denied the motion to amend. The magistrate indicated in his handwritten note on the endorsement style order denying the amendment that nothing would preclude Bochese from litigating those facts related to the loss of the seventy-foot building height under the pending claim in the operative complaint.[4] The Court of Appeals did not affirm the District Court's determination of lack of

[4] The Town's assertion that the amended complaint was not attached to the motion to amend is not only irrelevant but also untrue. Pursuant to local procedure, the proposed amended complaint is not docketed. It is only provided to the District Court for review with the motion.

subject matter jurisdiction based on *Rooker-Feldman* and instead stated that the District Court did not examine its own subject matter jurisdiction in terms of justiciability.

4. The Town argues that Bochese has raised, for the first time, that the seventy-foot issue has been tried by express consent and that it was not raised in the appellate court below during oral argument. This is true. There was no need. The panel of the Court of Appeals nor the parties ever questioned whether the claim of the loss of the seventy-foot building height was properly before the Appellate Court during oral argument. Bochese urges this court to request the Eleventh Circuit transcript of the oral argument. The transcript will reveal that the parties litigated the issue of the seventy-foot building height and that the Town admitted that Bochese had previously had the right to build to seventy feet, which was taken away because of the Town's repeal of Ordinance 84-11. The Court of Appeals subsequently determined *sua sponte* that the seventy-foot issue was not before the court since it was not contained in the amended complaint. Bochese could have easily demonstrated to the contrary if provided an opportunity. This case presents a textbook example of why due process requires uniform standards of *sua sponte* deliberation. Finally, both the text of Rule 15(b) and the decisions of this court do not require a party to file a motion in order for parties to try issues by express consent or under the procedural circumstances discussed herein to first assert such a position in the courts below.

"Rule 15(b) is intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel. Courts should interpret Rule 15(b) liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the